



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel KCS

DATE: September 24, 1999

SUBJECT: MUR 4806 General Counsel's Report

The attached is submitted as an Agenda document for the Commission Meeting of _____

Open Session _____

Closed Session _____

CIRCULATIONS

SENSITIVE

☒

NON-SENSITIVE

☐

72 Hour TALLY VOTE ☒

24 Hour TALLY VOTE ☐

24 Hour NO OBJECTION ☐

INFORMATION ☐

DISTRIBUTION

COMPLIANCE

☒

Open/Closed Letters ☐

MUR ☐

DSP ☐

STATUS SHEETS ☐

Enforcement ☐

Litigation ☐

PFESP ☐

RATING SHEETS ☐

AUDIT MATTERS ☐

LITIGATION ☐

ADVISORY OPINIONS ☐

REGULATIONS ☐

OTHER ☐

BEFORE THE FEDERAL ELECTION COMMISSION

SEP 24 9 45 AM '99

In the Matter of)
)
) MUR 4806
DNC Services Corporation/Democratic)
National Committee and Andrew Tobias,)
as treasurer)
Howard M. Glicken)
Hamilton Bank, N.A.)
Eduardo A. Masferrer)
Maria F. Diaz)

SENSITIVE

GENERAL COUNSEL'S REPORT

I. BACKGROUND

On September 1, 1998, the Federal Election Commission ("the Commission") found reason to believe that DNC Services Corporation/Democratic National Committee and its treasurer ("DNC"),¹ violated 2 U.S.C. § 441b(a) by accepting and depositing a contribution totaling \$50,000 from a national bank. On that same date, the Commission also found reason to believe that Hamilton Bank, N.A. ("the Bank")²; the Bank's Chairman, Eduardo A. Masferrer; and its Senior Vice President, Finance, Maria F. Diaz³ violated 2 U.S.C. § 441b(a) by making and consenting to, a prohibited national bank contribution to a Federal political committee. Finally, on that same date, the Commission determined to open an investigation into the matter

¹ On March 26, 1999, the DNC submitted an amendment to its Statement of Organization notifying the Commission of a change in treasurer. The current treasurer is Andrew Tobias. The previous treasurer was Carol Pensky.

² The term "Bank Respondents" will be used when referring collectively to the Bank and its officers. Mr. Masferrer is Chairman of the Bank, and at the time of the events in issue, Ms. Diaz was Senior Vice President, Finance of the Bank.

³ According to an article in the *Sun-Sentinel*, Ft. Lauderdale, Florida, dated December 2, 1998, John M.R. Jacobs succeeded Ms. Diaz as Senior Vice President, Finance of the Bank, but she is still employed there.

and sent Subpoenas for the Production of Documents to the DNC and Howard M. Glicken, and sent Orders to Submit Written Answers to the Bank Respondents and Mr. Glicken.⁴

This matter was generated by a referral from the Office of the Comptroller for the Currency ("OCC"). Prior to the Commission's reason to believe findings, the OCC furnished this Office with materials that included a letter to Mr. Masferrer from Mr. Glicken, soliciting a \$50,000 contribution to the DNC, which would entitle him to become a Trustee Member of the DNC. Along with the referral material, this Office also received documents from the OCC showing that prior to the contribution, the Bank had received advice from its outside and in-house counsel and a written opinion from the DNC's General Counsel, that as a national bank, the Bank could only make a lawful contribution specifically designated for the DNC's Building Fund. In addition, the OCC gave this Office a copy of the Bank's April 26, 1996 check made out to the DNC and a copy of the Bank's purchase requisition form that authorized the contribution, both of which were designated for the purpose of an "Annual Trustee Membership." The purchase requisition form was approved by Mr. Masferrer and Ms. Diaz in apparent disregard of counsel's advice. The OCC also gave this Office a copy of a DNC letter to Mr. Masferrer dated November 15, 1996, thanking him for his support (contribution) which helped the DNC to carry out polling, media and get out the vote operations. Lastly, this Office was given a copy of a letter dated June 16, 1997 from the DNC to the Bank, written after the OCC had discovered the prohibited contribution, apologizing for inadvertently depositing the contribution into the DNC's non-federal corporate account instead of the Building Fund account, and accepting all responsibility for the error. *See First General Counsel's Report dated August 14, 1998.*

⁴ The Commission determined to make Mr. Glicken a non-respondent witness at that time, in order to conduct a preliminary investigation into the extent of his involvement in this matter.

During the investigation, this Office sought to uncover how and why the purchase requisition form and check failed to conform to the advice of counsel, including whether there would have been a motivation for the Bank to contribute to the DNC's non-federal account rather than to the Building Fund account in order to enable Mr. Masferrer to enjoy the privileges of being a DNC Trustee. Discovery was also directed to establishing whether Mr. Glicken had personally received the Bank's check on behalf of the DNC, as it is not unlawful, pursuant to 2 U.S.C. § 441b to solicit a national bank, but it is unlawful to accept or receive a contribution from one, other than a contribution designated for the DNC's Building Fund account.

All responses to the Commission's inquiries have been received. Both the DNC and the Bank Respondents have requested to enter into pre-probable cause conciliation with the Commission. Attachments 1 and 2, respectively. As discussed below, based on the information submitted by all of the Respondents, this Office recommends that the Commission approve the DNC's and the Bank Respondents' requests for pre-probable cause conciliation, approve the proposed conciliation agreements, and close the file regarding Mr. Glicken.

II. DISCUSSION

A. Bank Respondents' Explanation of Events Leading to the Contribution

The Bank Respondents submitted responses dated November 12, 1998 to the Commission's reason to believe findings and to the interrogatories. Attachment 3. They also submitted supplemental responses dated December 21, 1998 and August 27, 1999 to clarify matters raised by their previous responses. Attachment 4.

According to the Bank Respondents, in the Spring of 1996, Charles Dusseau, the former Florida Secretary of Commerce, and Mr. Masferrer held conversations regarding the making of a contribution to the DNC. Mr. Masferrer asserts that Mr. Dusseau advised him that contributing

to the DNC would be good business "for the Americas."⁵ Att. 3, pp. 3-4. Subsequently, by a follow-up letter dated April 1, 1996, Mr. Glicken, on behalf of the DNC, solicited Mr. Masferrer to become a "Trustee" of the DNC for \$50,000 which would entitle him to certain privileges that were outlined in his letter. *Id.* pp. 3-4, and 17-18.⁶

According to the Bank Respondents, after the receipt of Mr. Glicken's letter, Mr. Masferrer met with Ms. Diaz and the Acting General Counsel of the Bank, Armin Seifart, regarding the legality of the Bank making a contribution to the DNC. Mr. Masferrer instructed them to find out if such a contribution were legal, and Mr. Seifart proceeded to consult outside counsel on the issue. Pending legal approval, Mr. Masferrer instructed Ms. Diaz to prepare the required paperwork to process the contribution. *Id.*, pp. 5, 33.

On April 18, 1996, Ms. Diaz initiated the paperwork for the contribution and wrote on the Bank's "Purchase Requisition" form that the disbursement was for a "Trustee Membership," based on Mr. Glicken's letter, which was the only information available at the time. Although she and Mr. Masferrer signed the approvals for the requisition on this date, Bank Respondents state that Ms. Diaz also "directed her staff to hold the Purchase Requisition and issuance of the check until she had received legal approval for the contribution." *Id.* Upon receiving the legal approval of Mr. Seifart, Mr. Masferrer discussed the contribution with the Bank's Board Directors. According to the Bank Respondents, the Board of Directors approved the contribution

⁵ Hamilton Bank historically has obtained over two-thirds of its net income from transactions in Latin America. Att. 3, p. 4.

⁶ While Mr. Glicken's letter did not explicitly solicit \$50,000 from the Bank, the Bank Respondents aver that Mr. Glicken was not a party to the conversations between Mr. Masferrer and Mr. Dusseau, both of whom intended that the payment would be made for and by the Bank. Att. 3, p. 4.

on April 23, 1996 and directed Ms. Diaz to issue the check to the DNC. *Id.*, p. 34. Over the next few days Ms. Diaz and Mr. Dusseau communicated several times concerning the Bank's contribution to the DNC and she informed him that she would not instruct her staff to release a check until she received a formal legal opinion indicating that the contribution was permissible.

Shortly thereafter, Mr. Dusseau arranged for the DNC's General Counsel, Joseph Sandler, to provide a legal opinion to the Bank.⁷ Mr. Sandler sent Mr. Seifart a legal opinion dated April 24, 1996, which advised that it was unlawful for a national bank to make a contribution or expenditure in connection with any election to political office, but that a political party committee could accept donations from a national bank that were specifically designated for its building fund. Att. 3, pp. 13-14. Further, Mr. Sandler specifically instructed the Bank that, "[c]hecks to the Building Fund should be made payable to 'DNC--Building Fund.'" *Id.*

Bank Respondents state that after they received Mr. Sandler's legal opinion dated April 24, 1996, Ms. Diaz advised her staff to forward the purchase requisition form, Mr. Glicker's April 1, 1996 letter, and Mr. Sandler's letter to the Bank's Accounts Payable Department. Thereafter, according to the Bank Respondents, although an accounts payable staff person completed the purchase requisition form using Mr. Sandler's letter regarding the DNC's mailing address, the staff person "inadvertently failed to revise the information previously included in the purchase requisition to reflect that the contribution - and the check - should be made to the DNC's Building Fund as indicated in the legal opinion. Using the incorrect information listed on the Purchase Requisition, an accounts payable clerk typed a check made payable to the DNC instead of the DNC - Building Fund." *Id.*, p. 34.

⁷ Mr. Sandler's phone log for Tuesday, April 23, 1996, indicates that he received phone calls from Mr. Dusseau and from Ari Swiller regarding the contribution from Hamilton Bank. Attachment 5, p. 3.

The factual and legal analysis provided to the Bank Respondents referenced a DNC thank you letter, dated November 15, 1996, that was addressed to Mr. Masferrer, which indicated that the contribution had been used for "polling, media and get out the vote operations" and not for building related expenses. In their response, the Bank Respondents' stated that they failed to notice that the letter indicated that the contribution was mis-deposited and used for the wrong purpose. According to the Bank Respondents:

The letter was sent seven months before the error regarding the DNC's mis-deposit of the Bank's check was discovered, and the Respondents had absolutely no reason to believe that this letter signified that any violation of the Act may have occurred. The letter contained no reference to the trusteeship or benefits.

Id., p. 10.

At the time of the reason to believe finding, this Office was aware only of the November 15, 1996 thank you letter. During the investigation in this matter, however, the DNC produced copies of four additional letters addressed to Mr. Masferrer (although not signed) regarding the contribution. Attachment 6. The first two (2) letters, dated June 10 and June 17, 1996, like the November 15, 1996 letter, indicate that the money from the Bank was used for election-related activities – not for building fund purposes. In fact, none of the letters mention the building fund. *Id.* Thus, assuming the letters were sent, it appears that the Bank Respondents had notice within two weeks of the DNC's receipt of the contribution, that the funds were used for election-related activities and not for building-related expenses. In response to an inquiry from this Office, counsel for the Bank Respondents stated that "all correspondence in their possession pertaining to the April 26, 1996 payment has previously been provided to the

Commission." Att. 4, p. 4.⁸ The Bank Respondents did not provide the four additional letters produced by the DNC.

B. Was There Any Motivation for the Bank to Willfully Ignore Counsel's Advice?

The Bank Respondents assert that Mr. Glicken did not participate in the conversations that were held between Mr. Masferrer and Mr. Dusseau, and that both Mr. Masferrer and Mr. Dusseau understood that the contribution would be by and for Hamilton Bank, not from Mr. Masferrer personally. Att. 3, pp. 3-5. According to the Bank Respondents, their interest in obtaining a Trustee membership with the DNC was that they thought the purchase would be good for Hamilton Bank's business. Moreover, the Bank Respondents point out that Mr. Masferrer did not receive the enumerated benefits detailed in Mr. Glicken's solicitation, including "preferential treatment for appointments to Boards and Commissions." *Id.* Further, the Bank Respondents state that "Mr. Masferrer was never interested in obtaining 'personal' benefits. Mr. Masferrer never received, *nor pursued*, the list of personal benefits of becoming a trustee enumerated in Mr. Glicken's letter." *Id.*, p. 9.⁹ (Emphasis in the original.)

In addition, the Bank Respondents point out that it had not been established that Respondents believed that the trustee membership would have been unavailable to Mr. Masferrer if the Bank's check had been made out to DNC Building Fund. In fact, information obtained during the investigation from counsel for the DNC, confirms that as a matter of general DNC

⁸ The fourth letter, dated December 31, 1996, which came after the letter that the Bank Respondents recall receiving, also indicates that the Bank's contribution was used for election-related purposes. Att. 6, p. 5.

⁹ According to the Bank Respondents, Mr. Masferrer attended only two events, a Presidential Gala in Miami, Florida on April 29, 1996, which he attended with other members of the Bank's Board of Directors, and a smaller gathering of approximately 60 persons attended that same evening. Attachment 7 and Att. 3, p. 4. Mr. Masferrer also received an invitation to a Christmas party at the White House in December 1996. Att. 3, pp. 4 and 9.

policy and practice, "[t]he determination by the DNC that such contribution was to be deposited in the Building Fund account as distinct from another non-federal account did not...affect the donor's eligibility to be considered a 'member' or participant in such a donor council or program." Attachment 8, p. 1.¹⁰

C. How the Check was Transmitted to the DNC

Information provided during discovery indicates that the Bank's \$50,000 check was not hand-delivered to the DNC or to one of its agents, but rather was sent by the Bank to the DNC via the United States Postal Service. Although the Bank Respondents are unable to produce evidence to support this claim, they assert that Mr. Masferrer is positive that he did not hand-deliver it when he attended the DNC sponsored Presidential Gala in Miami, Florida on April 29, 1996, and that it is "highly unlikely" that any other Bank attendee would have done so. Att. 3, p. 36 and Att. 4., p. 2. Further, Bank Respondents imply that the normal procedure for sending out disbursements is through the mail, and this particular disbursement was not treated any differently. Att. 4, pp. 2 and 5. This Office has not obtained any evidence to the contrary.

On October 30, 1998, Mr. Glicken submitted a response to the Commission's subpoena and order. Attachment 9. According to Mr. Glicken, Mr. Dusseau contacted Mr. Masferrer initially and learned that Mr. Masferrer was interested in contributing to the Presidential Gala. Mr. Glicken asserts that he was asked to talk to Mr. Masferrer, and did so "via telephone

¹⁰ Based on the information supplied by the DNC, it also appears that one becomes a "Managing Trustee" or "Trustee" of the DNC depending upon the amount of money contributed or raised. A "Managing Trustee Membership" requires annual contributions of \$100,000, and a "Trustee Membership" requires annual contributions of \$50,000 or \$100,000 in raised contributions. Att. 7. The documents do not make a distinction between contributions in the form of hard money or soft money.

sometime late March or early April 1996." *Id.*, p. 1. Mr. Glicken acknowledges that he sent Mr. Masferrer a follow-up letter regarding the contribution to the DNC, in his capacity as a Director of the DNC National Finance Board. Mr. Glicken contends that he had no other conversations with Mr. Masferrer but was kept apprised of the situation by Mr. Dusseau.

Mr. Glicken states that he was informed later that Hamilton Bank's lawyers questioned whether the bank could make a contribution to a political party, at which point Jay Dunn, an employee of the DNC, was asked to speak to Hamilton Bank's legal staff regarding the contribution. According to Mr. Glicken, Mr. Dunn arranged a conference call between Joseph Sandler, General Counsel for the DNC, and Hamilton Bank's legal staff. Mr. Glicken asserts that it was determined that Hamilton Bank could make a contribution to the DNC Building Fund but does not recall whether the contribution check was sent to Mr. Dunn, Mr. Dusseau or himself. *Id.*

The documents provided by the DNC do not shed any light on the person or persons who accepted the contribution on behalf of the DNC. In addition, the Bank Respondents have indicated that they do not specifically recall how the envelope containing the DNC contribution was addressed. However, they have indicated that in the ordinary course of business, payments to third parties are mailed out in "window" envelopes, in which the "pay to the order of" information on the check also serves as the addressee information. Here, the check was to be paid to the DNC at its Washington, D.C. address. The Bank Respondents conclude from this that "[t]he envelope thus would not have been addressed to the attention of a specific individual." Att. 4, p. 5. Accordingly, this Office is unable to establish that any specific person physically accepted the Bank's contribution on behalf of the DNC.

III. ANALYSIS

This Office finds the Bank Respondents' explanation of events credible, including their contention that they intended to contribute to the Building Fund. The explanation is supported by their documented efforts of delaying the contribution until the receipt of advice from outside counsel and a legal opinion from the DNC. Moreover, as discussed above, information obtained during the investigation appears to negate that the Bank Respondents would have any motivation to misdirect the contribution based on a desire to receive a Trustee membership. However, this Office does not conclude that the misdirected contribution was a matter of mere "inadvertence" nor that an accounts payable employee should be credited with the error. While not rising to the level of a knowing and willful violation, it appears that Mr. Masferrer and Ms. Diaz had a responsibility to ensure that the purchase requisition form, which they both signed, was accurate before it went to the accounting department and that specific instructions were given so that the designated payee on the check complied with the explicit legal advice.¹¹ Their failure to do so resulted in their consenting to the prohibited contribution. Moreover, the investigation revealed that the DNC apparently sent Mr. Masferrer and the Bank several written communications reflecting that the \$50,000 contribution had been used for political party activities, and these communications, if received, should have caused some concern. Att. 6.

Although the DNC attempted to absolve the Bank from any mistake it made in the transaction, and tried to shift the blame solely to the DNC staff who processed the contribution, see Att. 3, p. 16, it is clear that the Bank Respondents indeed made mistakes. Moreover, the DNC compounded their mistakes and committed its own violation by accepting a check which

¹¹ The Bank Respondents have not claimed that any such specific instructions -- oral or written -- were ever conveyed.

on its face was from a national bank and depositing it in the non-federal corporate account, where it was illegally used during the 1996 election for political activities such as polling, media, and get out the vote. Therefore, Hamilton Bank, N.A., Eduardo A. Masferrer and Maria F. Diaz, and the DNC and Andrew Tobias, as treasurer, each violated 2 U.S.C. § 441b(a).

With respect to Mr. Glicken, while he was involved in the solicitation of the contribution on behalf of the DNC, this Office was unable to prove that he personally received the Bank's prohibited contribution. He does not recall if he did, and the Bank has no records to show that the check was sent to his attention or otherwise delivered to him (or to any other specific individual). Accordingly, this Office recommends that the Commission take no action against Howard M. Glicken and close the file as to him.¹²

IV. DISCUSSION OF CONCILIATION AND PROPOSED CIVIL PENALTIES

¹² At the time in which this Office prepared the First General Counsel's Report in this matter, the extent of Charles Dusseau's role if any, in accepting the prohibited contribution was unclear. Thus, this Office made no recommendations regarding him pending the outcome of the investigation. As a result of the check being mailed directly to the DNC, this Office makes no recommendations with regard to Mr. Dusseau.


V. RECOMMENDATIONS

1. Take no action against Howard M. Glicker and close the file as to him.
2. Enter into pre-probable cause conciliation with Hamilton Bank, N.A., Eduardo A. Masferrer, and Maria F. Diaz, and approve the attached proposed conciliation agreement.
3. Enter into pre-probable cause conciliation with the DNC Services Corporation/Democratic National Committee and Andrew Tobias, as treasurer, and approve the attached proposed conciliation agreement.

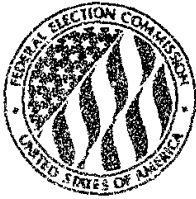
4. Approve the appropriate letters.

Lawrence M. Noble
General Counsel

9/23/99
Date

BY: 
Lois G. Lerner
Associate General Counsel

201.144.396.44.11



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARY W. DOVE/VENESHE FEREBEE-VINES VW
COMMISSION SECRETARY

DATE: SEPTEMBER 29, 1999

SUBJECT: MUR 4806- General Counsel's Report
dated September 23, 1999.

The above-captioned document was circulated to the Commission
on Friday, September 24, 1999.-----

Objection(s) have been received from the Commissioner(s) as
indicated by the name(s) checked below:

Commissioner Elliott	—
Commissioner Mason	<u>XXX</u>
Commissioner McDonald	<u>XXX</u>
Commissioner Sandstrom	<u>XXX</u>
Commissioner Thomas	<u>XXX</u>
Commissioner Wold	—

This matter will be placed on the meeting agenda for Tuesday,

October 19, 1999. Please notify us who will represent your Division before the
Commission on this matter.